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AUG 4 1958
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 153.

NORTON R. GANGER et al.,
Appellants,

vs.

CITY OF MIAMI,
Appellee.

THOMAS B. HAMILTON et al.,
Appellants,

vs.

CITY OF MIAMI,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLANTS' REPLY TO MOTION TO DISMISS APPEAL.

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Properly to consider appellee's contention that no federal question was raised and passed upon by the Supreme Court of Florida a brief restatement of what the suit is all about may help.

The Miami City Charter is a state statute. It permits the city to improve streets and charge the costs against abutting property. The statute requires that the proceedings be commenced by an initiating resolution. Notice of the adoption of the resolution must be given to abutting property owners. When the work is done and liens are imposed a hearing is had. Notice must be given to this hearing.

The charter only provides for a notice to be published in the newspaper and no other or further notice was given to the property owners, the appellants here.

The property owners contested the assessment by a suit in the State Circuit Court. The complaint challenged both the sufficiency of the notice and the want of benefits under the Fourteenth Amendment to the United States Constitution.

The city by its answer alleged that the property owners had received legal notice of the hearing and had made no objection to the assessment. It was asserted that, as a result of this inaction, they were bound by the determination of the city council that the property was benefited by the improvement. It was further contended that because of these conditions the property owners were estopped to challenge the validity of the assessment.

The Circuit Court held that the property owners were not estopped to challenge the existence of benefits because the notice, which the city had given, was insufficient as a matter of law and also,

> "because it was inserted in the classified section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment." (R. 21).

The Court then held that there had been no benefit to the abutting property by reason of the alleged improvement.

The State Supreme Court affirmed this decree on a non-federal ground viz.: that the city lacked authority to do the work. A minority of the Court dissented holding that the city did have such power and that the property owners could not challenge the assessments because they had ample legal notice of the imposition of the assessment liens.

The city petitioned for re-hearing which was granted and, in a subsequent opinion, the Court reversed the decree (three justices dissenting) and held that the notice was sufficient and that the appellants were estopped by the determination of benefits in the administrative proceedings.

The appellants petitioned for re-hearing assailing the holdings on the ground that it was contrary to the decision of this Court in *Mullane* v. *Central Hanover Bank & Trust Company*, 339 U.S. 306 and *Walker* v. *City of Hutchinson*, 352 U.S. 112. They also procured leave to file a special brief directed to the federal constitutional question and in this brief specifically called the Supreme Court's attention to *Wisconsin Electric Power Company v. City of Milwaukee*, 352 U.S. 948. This case directly ruled on the precise question here presented. This petition was duly considered and denied (R. 75).

The whole case in both the lower court and the Florida Supreme Court turned upon the City's contention that the property owners *were* bound by the administrative proceedings, since the newspaper notices of the adoption of the initiating resolution and the hearing on the confirming resolution were sufficient to bind them.

The property owners' whole contention in the lower and Supreme Courts of Florida was that they were *not*

bound by the proceedings since the newspaper notices were *not* adequate and that there were no benefits flowing from the work.

The constitutional sufficiency of the newspaper notices and the existence of benefits were the only matters in litigation.

The holding by the Florida Supreme Court in its last opinion on the City's Petition for Re-hearing that the property owners were estopped to deny the existence of benefits *necessarily* determined that the newspaper notice afforded them procedural due process.

Therefore, for the City to contend now, as it does here, that these Federal constitutional questions were not decided by the lower court and were not passed upon by the Florida Supreme Court adversely to the Appellants' contention is to assert something which is simply not so.

The Appellee's Motion consists of three paragraphs and the first has several subheadings. The Appellee alleges in the first paragraph of its Motion that Appellants' Jurisdictional Statement fails to comply with Supreme Court Rule 15. While the Jurisdictional Statement meticulously tracks Rule 15, the Appellants will answer each sub-paragraph and in so doing will follow the same letter designations employed by Appellee. Appellee's contention appears on the left half of the page and Appellants' Reply on the right.

1. Statement fails to set forth:

(a) Copies of the final decree of the trial court, the Circuit Court of Dade County, Florida, which were reversed by opinions and judgments	(a) Reply: There is no such requirement. The Final Decrees of the trial court were in favor of Appellants. The Appellants seek review of the opin-

of the Florida Supreme Court.

ion and judgment of the State Supreme Court which reversed the Final Decrees of the Circuit Court. The Appendix to the Jurisdictional Statement includes the opinions and judgments of the Supreme Court of Florida, of which review is sought as required by Supreme Court Rule 15 (a) and (h).

(b) Any statement showing that there was drawn in question the validity of a Florida Statute on the ground of its being repugnant to the constitution, treaties or laws of the United States.

(b) Reply: The Statement directly alleges (p. 3) that definite specified sections of Chapter 10-847, Laws of Florida, 1925, are involved. These are the parts of the city charter—a state statute —which prescribed the manner and form of notice which the Supreme Court held to be valid. The Jurisdictional Statement specifies that the appeal is taken pursuant to Title 28, Section 1257 (2), and lists the cases relied upon, and the question presented (p. 3) as required by Supreme Court Rule 15

(b). It also recites that the complaint charged that the assessments were void as being in contravention of the Federal Constitution (p. 8).

(c) The manner in which the questions presented by said Appellants, were brought before the trial and appellate courts.

(c) Reply: Supreme Court Rule 15 contains no such requirement but if it did, the Jurisdictional Statement recites that the Complaints alleged that the liens imposed "constituted a taking in violation of the Constitution of the United States" (p. 8). Also that the Federal questions were specifically briefed for the Supreme Court of Florida (p. 13). The Circuit Court of Dade County (p. 8) directly held as follows: "The notice of hearing of objections to the imposition of the assessments hereinabove referred to was insufficient as a matter of law * * *. The notice was also insufficient because it was inserted in the classified

section of the Miami Herald and in such a manner that it cannot be said that any reasonable person was put upon notice by it that their property was going to be subjected to a special assessment."
This finding of the court was assigned as error by the City (R. 25).

(d) Any statement showing when or how the questions sought to be reviewed were raised in the court of first instance or in the appellate court.

(d) Reply: The Jurisdictional Statement shows that the complaint alleged that the notice under the administrative proceeding was insufficient, that no benefits were derived and that the City's action in imposing the liens constituted a taking in violation of the Constitution of the United States (R 6). The Appellants raised a federal constitutional question in their petition for rehearing which was addressed to the opinion reversing the decree. Prior to that time the Supreme Court had affirmed the decree

	of the lower court on non - federal grounds. When the City's petition for re-hearing was granted, the Appellants filed a brief in the Supreme Court directly calling that Court's attention to the decisions in the Walker and Mullane cases cited in our Statement. The Appellants continuously harped on the contention that the notice was insufficient and that no benefits were received
(e) Any statement showing how the questions sought to be reviewed were passed on by the court of first instance or the appellate court.	(e) Reply: The lower court decreed that the notice published in the Classified Section of the Miami Herald was "insufficient" (R. 21). The Supreme Court of Florida recited this finding of the lower court and simply held the notice to be sufficient (Appendix 7).

2. Appellee does not here assert that no federal questions were raised in the courts below, it is simply asserted that the "Said federal questions were *not expressly* passed on by the trial or appellate courts". (Emphasis supplied). The quotations made by Appellees from

the Jurisdictional Statement plainly show that the questions were raised in the lower court, but we shall further elaborate on this showing from the Jurisdictional Statement and the record.

The complaints before the trial court alleged (R. 6, 7):

> "The special assessment liens sought to be imposed upon the abutting property owners in Highway Improvement District H-477 are illegal and void and constitute taking of property in violation of the Constitution of the United States and of the State of Florida, upon the following grounds:
>
> * * *
>
> C. The Notice was published in an inconspicuous place upon the classified advertising section of the MIAMI HERALD, a position in which it was least likely to attract attention of persons such as the Plaintiffs and those on whose behalf this suit is brought.
>
> E. The improvements which the City made were of a general and public character, and not for the benefit of the abutting property owners."

The lower court found that the Notice by Publication was insufficient and also that there were no benefits conferred by the resurfacing. On appeal to the Supreme Court, the City in its assignments of error specified the following (R. 25):

> "3. The Chancellor erred in finding that the Notice of Hearing of Objections to the Conformation of the Resolution ordering Highway Improvement District H-477 was insufficient as a matter of law.
>
> "4. The Chancellor erred in finding that the Notice was insufficient because it was inserted in the classified section of the 'Miami Herald'.

"5. The Chancellor erred in finding that any reasonable person was not put upon notice that their property was to be specially assessed."

The Supreme Court of Florida affirmed the decree of the lower court, Thornal, J., specially concurring, upon the ground that the owners had received no special benefit.

The City then filed a petition for rehearing in which it said (R. 45):

> "In this connection Justice Thornal overlooked or failed to consider that if, in making special assessments, due notice was accorded the property owners by the City of Miami as required by the Charter as held in the opinion of Justice Thomas, then in that event all provisions of organic law that pertain to due process were complied with."

Justice Thornal agreed that this petition should be granted and the cause was re-heard. On re-hearing Thornal, J., joined with Drew, O'Connell and Hobson, J.J., who had dissented from the majority opinion, and thereby reversed the decree of the circuit court. In reversing the decree the Court (per Drew, J.) said (R. 54):

> "Section 56 of the charter of the City of Miami provides in detail the steps to be taken by the City officials in authorizing public improvements, the cost of which are to be paid in whole or in part by the owners of the land abutting said improvements and especially benefited thereby. The various notices required to be published are for the purpose of advising the property owners affected of the nature and extent of the improvements, the extent of the assessments to be made against the land to be especially benefited thereby and the details of such construction so that the affected property owners may be fully advised as to what is contemplated, the approximate cost of the improvement and the approximate amount to be ultimately assessed against the affected property. * * *

> The failure of the property owners here to promptly assert whatever rights they had or make any effort to comply with the applicable provisions of the city charter now estops them from questioning the validity or amount of these assessments."

The property owners filed a petition for re-hearing in which they said (R. 68):

> "4. In holding the notice of the confirmation of the assessment roll sufficient, and that the appellees were estopped to challenge the lack of benefits because they failed to object pursuant to the notice, the Court overlooked, or failed to consider that the procedure for the imposition of assessment liens is quasi judicial and that the requirements of procedural due process guaranteed by Amd. XIV, U.S. Const., must be complied with. In the case of residents, constructive notice, as attempted, is violative of the rights secured by such amendment."
>
> *Walker* v. *City of Hutchinson,* 77 S. Ct. 200.
>
> *Mullane* v. *Central Hanover Bank & Trust Co. et al.,* 339 U.S. 306."

Although the Appellant property owners had filed a brief on the City's petition for re-hearing, in which the Court's attention was called to the *Walker* and *Mullane* cases, *supra,* nevertheless before the petition for re-hearing was disposed of, they applied to the Court for permission to file a special brief, a procedure which was not sanctioned by the rules.

The order recited (R. 73):

> "On application of attorney for appellees in the above named consolidated causes, it is ordered that said attorney be and he is hereby allowed until February 13, 1958, to file brief in this cause confined solely to the federal constitutional question presented by the petition for rehearing."

To admit that the Florida Supreme Court allowed a brief to be filed on a petition for rehearing, although the rule made no provision therefor and to admit that the Court considered the petition for rehearing, as it said it did, and then to argue that the Court did not pass on the question presented by the petition and the brief, is to attribute to that Court a high degree of indifference.

The Appellants raised the federal constitutional questions in their pleadings in the lower court and in the Supreme Court of Florida. This was all that was necessary.

In *Bellingham Bay & B. C. R. Co.* v. *City of New Whatcom*, 172 U.S. 314, the City ordered certain improvements to be made upon a town's street. Later an assessment was levied upon the abutting property. Suits were brought against various defendants owning lots abutting on the street for the purpose of obtaining decrees foreclosing the liens created by the assessments. The Court said:

> "By its answer, the defendant raised a federal question, inasmuch as it alleged that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the 14th Amendment to the Constitution. This Court therefore has jurisdiction of the case."

The suggestion that the Florida Supreme Court did not pass upon the federal constitutional questions raised by the petition for re-hearing is wholly without foundation. The order on the petition for re-hearing recited (R. 75) that a petition for re-hearing had been filed "and the same having been duly considered, etc." was denied. In so doing, it *necessarily* decided that the Appellants' contention was incorrect and that the notice was sufficient under the federal constitution. In *Meyer* v. *City of Richmond*, 172 U.S. 82, the jurisdiction of this Court was challenged on

the ground that the federal question was not raised in the court below. The question involved was not raised in the declaration, but it was subsequently raised, which this Court said was sufficient. In his petition to the Court of Appeals, the plaintiff set up a right under the Federal Constitution. In holding that this was sufficient to present a federal question this Court said:

> "Necessarily, therefore, the Supreme Court of Appeals did as the Court of the City of Richmond did, * * * considered the right which the plaintiff claimed under the Constitution of the United States, and denied the right. Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 288, 17 S. Ct. 581.
>
> * * *
>
> So far the contention of the power of review by this Court existed. A right under the Constitution of the United States was specially set up, and the right was denied. * * *
>
> 'This Court therefore has jurisdiction, and we proceed to the consideration of the merits.' "

In *Arrowsmith* v. *Harmoning*, 118 U.S. 194, the appellant, by an assignment of error, asserted for the first time that his constitutional rights had been invaded. The Court said that it was not easy to see upon what ground the assertion was made that rights under the federal constitution had been denied. Nevertheless it took jurisdiction of the case saying:

> "It was for this reason, perhaps that the Supreme Court, while affirming the judgment of the District Court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied, * * *"

There were no other attacks made on the assessment than the insufficiency of the notice and the want of benefits both of which raised federal constitutional questions. The petition for re-hearing is a bristling indictment of the Florida Supreme Court's opinion holding that the Appellants were bound by the administrative proceedings. There is no other question involved.

The fact that the federal question was necessarily passed upon by the Supreme Court of Florida is evidenced by the fact that Justices Thomas, Roberts and Hobson voted to grant the property owners petition for re-hearing. Justice Hobson had, prior to this time, sided with the majority of the Court in holding that the notice was sufficient. His switch to the Appellants' side of the case was plainly the result of a consideration of the Appellants' petition for rehearing in the Supreme Court of Florida.

In *Herndon* v. *Georgia*, 295 U.S. 441, this Court declined to take jurisdiction of an appeal from the Supreme Court of Georgia to review a conviction of Herndon of an attempt to incite to insurrection. Between the date of the appellant's conviction and the date of the determination of his motion for a new trial, the Supreme Court of Georgia decided another case involving a construction of the statute under which Herndon was convicted. The Supreme Court held that Herndon had had a clear opportunity to raise the question as to the applicability of the latter decision before his motion for a new trial was ruled on, and that it was therefore too late to raise federal constitutional questions by a petition for re-hearing, and that that court was without jurisdiction for the reason that no federal question was seasonably raised. In dissenting on this point, Cardozo, J. (Brandeis and Stone concurring), said this:

> "* * * The settled doctrine is that when a constitutional privilege or immunity has been denied for the

first time by a ruling made upon appeal, a litigant thus surprised may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. Missouri v. Gehner, 281 U.S. 313, 320, 50 S. Ct. 326, 74 L. Ed. 870; Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 678, 50 S. Ct. 471, 74 L. Ed. 1107; American Surety Co. v. Baldwin, 287 U.S. 156, 164, 53 S. Ct. 98, 77 L. Ed. 231, 86 A.L.R. 298; Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 367, 53 S. Ct. 145, 77 L. Ed. 360, 85 A. L. R. 254; Saunders v. Shaw, 244 U.S. 317, 320, 37 S. Ct. 638, 61 L. Ed. 1163. Within that settled doctrine the cause is rightly here."

Presumably the Supreme Court considered the federal questions as they were raised and briefed before the Appellants' Petition for Re-hearing was denied. In *Saunders v. Shaw*, 244 U.S. 317, Holmes, J., held that a writ of error could be maintained to review a final judgment of the State of Louisiana in a drainage assessment case, even where the federal questions were not raised in the State Supreme Court until *after* a Petition for Re-hearing had been denied. In so holding, the Court said:

"The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. * * * It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of

the state by his assignment of errors. We do not see what more he could have done."

3. Appellees here urge that no constitutional question is presented because "none of the said appellate opinions discussed any Constitutional Question". The position is untenable. If discussion by an appellate court in its opinion is a condition precedent to the exercise of this Court's jurisdiction on appeal from such a decision, then the Supreme Courts of the several states may effectively prevent such right by refusing to discuss federal questions when they are raised.

Does the fact that the Supreme Court of Florida did not write an opinion on the petition for rehearing directly passing on the federal constitutional questions make any difference? This Court in *McCullough* v. *Commonwealth of Virginia*, 172 U.S. 102, held exactly to the contrary, saying:

> "Could it be said that the silence of the state court in its opinion change the scope and effect of the decision? In other words, can it be that the mere language in which the state court phrases its opinion takes from or adds to the jurisdiction of this court to review its judgment? Such a construction would always place it in the power of a state court to determine our jurisdiction."

If the property owners did not have notice they were not estopped. The Florida Supreme Court held that they were estopped. In so holding it necessarily held that the notices published in the newspaper were sufficient. Thereby it decided a question of due process under the 14th Amendment contrary to *Wisconsin Electric Power Company* v. *City of Milwaukee*, 352 U.S. 948.

The Motion to Dismiss should be denied.

Respectfully submitted,

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I, Thomas H. Anderson, one of the attorneys for the appellants herein, and a member of the Bar of the Supreme Court of the United States, certify that on the ____ day of July, 1958, I served a copy of the foregoing Appellants' Reply Brief on the City of Miami by mailing a copy in a duly addressed envelope with sufficient postage prepaid to carry the said Reply Brief to William L. Pallot, the City Attorney for the City of Miami, 65 S. W. 1st Street, Miami, Florida.

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